

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

**BLANCA DE LA TORRE,
a/k/a JAZMIN ZUNIGA,
Claimant**

VS.

NATIONAL BEEF PACKING COMPANY
Respondent

AND

**LIBERTY MUTUAL INSURANCE COMPANY and
ESIS/FIDELITY & GUARANTY INSURANCE**
Insurance Carriers

Docket No. 1,004,976

ORDER

Respondent and its insurance carrier Liberty Mutual Insurance Company appeal the March 2, 2005 Award of Administrative Law Judge Pamela J. Fuller. The Appeals Board (Board) heard oral argument on August 9, 2005.

APPEARANCES

Claimant appeared by her attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company (Liberty) appeared by their attorney, Terry J. Malone of Dodge City, Kansas. Respondent and its insurance carrier ESIS/Fidelity & Guaranty (ESIS) appeared by their attorney, Shirila R. McQueen of Liberal, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUE

What is the appropriate date of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant suffered accidental injury arising out of and in the course of her employment with respondent culminating on October 23, 2001. Claimant was pulling and packaging flats when she began developing problems in her upper extremities, shoulders and neck. She notified respondent and was referred to Rick J. Fitzgerald, M.D., and then was referred to Dr. Harrington, who ultimately referred her to Pedro A. Murati, M.D.

Claimant returned to work from Dr. Fitzgerald's appointment on October 23, 2001, with specific restrictions, which respondent did accommodate. These restrictions, which transferred claimant to light duty, resulted in claimant performing several different tasks over a period of several months. However, each of the tasks claimant performed fell within her medical restrictions. After a period of conservative care, claimant was returned to her regular job of bagging meat on February 12, 2004.

Claimant was rated by R. Raymundo Villanueva, M.D., at 6 percent to the body as a whole, with Edward J. Prostic, M.D., assessing claimant a 12 percent to the body as a whole. The parties stipulated to a 9 percent whole person impairment as a result of the injuries suffered by claimant during her employment with respondent. As noted above, the only dispute deals with the date of accident in this matter, which would determine which of the above insurance companies will be liable for claimant's benefits. Liberty argues that claimant's date of accident should be November 4, 2004, the last day claimant performed her regular duties before the regular hearing was held. Liberty argues that, in *Kimbrough*,¹ the Kansas Court of Appeals determined that moving the date of accident forward to the last possible date is in accordance with the state's policy. In *Kimbrough*, the claimant continued performing the same work that caused her injuries through the last day before the regular hearing.

However, here, the ALJ determined that the appropriate date of accident would be October 23, 2001, the day claimant was first placed in an accommodated position. The

¹ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

ALJ found *Treaster*² to be more on point with this situation, as, in *Treaster*, the date of accident was the last date that the claimant performed her regular job tasks before being moved to an accommodated position not substantially the same as her regular job. In *Treaster*, the Supreme Court found that the claimant's date of accident was the last day the claimant worked at the job that had been the cause of her injuries. The Supreme Court, in *Treaster*, citing *Berry*,³ stated:

If an accommodated position is offered and accepted that is not substantially the same as the previous position that claimant occupied, the *Berry* rule should be applied. The date of accident or occurrence will be the last day the claimant performed the earlier work tasks. This rule disregards attempts by either claimants or respondents to move a date of accident or occurrence to before or after an advantageous time for purely monetary or coverage reasons.⁴

The Board finds, in this instance, that claimant was removed to an accommodated position within her restrictions as of October 23, 2001.⁵ She remained in accommodated light duty work for a substantial period of time, leading up to her ultimate return to regular employment after successfully undergoing long-term medical care. Respondent and Liberty's reliance on *Kimbrough* is misplaced, as the *Treaster* facts are more on point in this instance. The Board, therefore, finds the Award of the ALJ in this instance should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 2, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

² *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

³ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁴ *Treaster* at 624.

⁵ The Board uses October 23, 2001, as the date claimant last performed her regular duties because this record does not clarify whether claimant went to Dr. Fitzgerald before or during her shift with respondent.

Dated this ____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: C. Albert Herdoiza, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and its Insurance Carrier (Liberty)
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier (ESIS)
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director